STATE OF MICHIGAN

COURT OF APPEALS

ELAINE BASSETT, individually and as next friend of GREGORY BASSETT III, a minor,

Plaintiff,

v

BURGER KING CORPORATION,

Defendant/Third-Party Plaintiff-Appellee,

v

KING DINING, INC., d/b/a BURGER KING RESTAURANT,

Defendant/Third-Party Defendant-Appellant.

UNPUBLISHED
October 28, 2010

No. 292433
Oakland Circuit Court
LC No. 2007-084435-CZ

Before: ZAHRA, P.J., and TALBOT and METER, JJ.

PER CURIAM.

King Dining, Inc., appeals as of right from the trial court's grant of summary disposition under MCR 2.116(C)(10) to Burger King Corporation (BKC). We affirm the grant of summary disposition and remand this case for a determination of appellate attorney fees.

King Dining is a franchisee of BKC. The franchise agreement between King Dining and BKC states:

> FRANCHISEE is responsible for all losses or damages and contractual liabilities to third persons arising out of or in connection with possession, ownership or operation of the Franchised Restaurant, and for all claims or demands for damages to property or for injury, illness or death of persons directly or indirectly resulting therefrom. FRANCHISEE agrees to defend, indemnify and save BKC and its subsidiaries, its affiliated and parent companies harmless of, from and with respect to any such claims, demands, losses, obligations, costs, expenses, liabilities, debts or damages, (including but not limited to reasonable

> attorney's fees) unless resulting from the negligence of BKC. . . . This obligation of FRANCHISEE to indemnify and defend BKC is separate and distinct from its obligation to maintain insurance . . . .

The franchise agreement specifies that King Dining must maintain liability insurance and that BKC must be named as an "additional insured" under any policy. The agreement provides that any insurance policy "will insure the contractual liability of FRANCHISEE under [the indemnity provisions of the franchise agreement]." King Dining entered into an insurance agreement with Allied Insurance Co., with Bosquett & Company named as the agent and with BKC named as an additional insured.

Under the heading "Defense of Claims," the franchise agreement states:

> BKC shall notify FRANCHISEE of any claims, and FRANCHISEE shall be given the opportunity to assume the defense of the matter; however, BKC shall have the right to participate in the defense of any claim or action against it which is assumed by FRANCHISEE, at BKC's own cost and expense. If FRANCHISEE fails to assume the defense of any claim covered by the indemnification provisions . . ., BKC may defend the action in the manner it deems appropriate, and FRANCHISEE shall pay to BKC all costs, including attorneys' fees, incurred by BKC in effecting such defense, in addition to any sum which BKC may pay by reason of any settlement or judgment against BKC. . . .

Plaintiff[1] was injured in a Burger King Restaurant owned by King Dining. Plaintiff filed a lawsuit on July 18, 2007, but named only BKC as a defendant and did not serve King Dining with a copy of the complaint. On December 7, 2007, BKC sued King Dining as a third-party defendant, claiming that King Dining failed to indemnify BKC and failed to assume the defense of the claim. King Dining claimed that it first received actual notice of the complaint when it was served with a copy of the third-party complaint on December 16, 2007. However, the record reveals that BKC sent multiple letters to King Dining before that date, requesting that King Dining indemnify BKC in plaintiff's lawsuit and notify the insurance carrier of the claim. Significantly, the record contains a proof of receipt, dated August 6, 2007, for one of the letters.

Despite notification from BKC, King Dining did not assume the defense until a later date, after it was named as a defendant in plaintiff's amended complaint.[2] Indeed, the record reveals

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[1] Plaintiff Gregory Bassett III was the injured party. For ease of reference, this opinion will refer to a singular "plaintiff."

[2] King Dining claims that BKC imposed a requirement that King Dining pay the Kitch Law Firm approximately $15,000 in attorney fees and costs before King Dining would be able to substitute in its own counsel in the underlying case. Although King Dining makes this assertion on appeal, it develops no separate, reasoned argument with respect to it, focusing instead on its "mitigation of damages" argument. We therefore decline to address the claim. See *Ypsilanti Charter Twp v Kircher*, 281 Mich App 251, 287; 761 NW2d 761 (2008).

that as of February 14, 2008, there had still been no formal acceptance of the defense by King Dining. On February 21, 2008, plaintiff filed an amended complaint naming King Dining as a defendant. Plaintiff's claims were eventually settled for $7,500; Allied paid this amount.

BKC filed a motion for summary disposition of the third-party complaint, alleging that King Dining had failed to properly indemnify BKC and assume the defense of plaintiff's claim. King Dining responded, in part, by claiming that BKC had failed to mitigate its damages because it failed to notify Allied about plaintiff's lawsuit.

The trial court granted summary disposition to BKC, concluding that there had been a clear breach of the franchise agreement by way of King Dining's failure to indemnify and defend BKC in plaintiff's lawsuit. It also indicated that King Dining's argument concerning BKC's alleged obligation to contact Allied was without merit because this action was not required by the franchise agreement. The court awarded attorney fees and costs of $20,292.03.[3] In making this award, the court stated:

> The [c]ourt notes that the attorneys fees and costs were substantial for an underlying personal injury matter which settled for a nominal amount, but, due to the fact that Burger King had to seek enforcement of the indemnification provision of the franchise agreement between the parties, they are reasonable.

King Dining contends that the trial court erred in granting summary disposition to BKC because BKC improperly failed to notify Allied of plaintiff's lawsuit and thus failed to mitigate its damages. King Dining claims that BKC knew where to send the notice because Bosquett's address was clearly set forth on a certificate of insurance that was in BKC's possession. King Dining claims that if BKC had notified Allied of the lawsuit, BKC would not have had to hire an attorney on its own and incur attorney fees and expenses. King Dining states:

> Whether [BKC] was unreasonable in failing to exercise its obligations as an insured under the Insurance Policy to immediately notify Allied of the litigation, and whether such failure constitutes a failure to use every reasonable effort within it[s] power to mitigate damages is a question of fact for the trier of fact.

We review de novo a trial court's decision regarding a motion for summary disposition. *Bennett v Detroit Police Chief*, 274 Mich App 307, 316; 732 NW2d 164 (2006). In evaluating a motion under MCR 2.116(C)(10), we review the documentary evidence in the light most favorable to the party opposing the motion to determine if there is a genuine issue of material fact. *Bennett*, 274 Mich App at 317.

As noted by BKC on appeal, the franchise agreement specifically states that "[the] obligation of FRANCHISEE to maintain insurance is separate and distinct from its obligation to

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[3] The amount claimed to have been billed by BKC's counsel was $27,104.01.

indemnify BKC . . . ." It also states that "[the] obligation of FRANCHISEE to indemnify and defend BKC is separate and distinct from its obligation to maintain insurance . . . ." Clearly, King Dining was obligated to indemnify and defend BKC even aside from any obligations relating to Allied.

Moreover, as noted above, the franchise agreement states:

> If FRANCHISEE fails to assume the defense of any claim covered by the indemnification provisions . . ., BKC may defend the action in the manner it deems appropriate, and FRANCHISEE shall pay to BKC all costs, including attorneys' fees, incurred by BKC in effecting such defense, in addition to any sum which BKC may pay by reason of any settlement or judgment against BKC. . . .

We interpret unambiguous contractual provisions as written. *Coates v Bastian Brothers, Inc*, 276 Mich App 498, 503; 741 NW2d 539 (2007). The franchise agreement clearly obligated King Dining to indemnify and defend BKC in plaintiff's lawsuit, regardless of any insurance provisions. The record contains uncontradicted evidence that King Dining failed to defend BKC in the lawsuit despite having received notice. Accordingly, BKC was obligated to defend its own interests, and the franchise agreement clearly states that in such a situation, King Dining "shall pay to BKC all costs, including attorneys' fees, incurred by BKC in effecting such defense . . . ." Moreover, nothing in the franchise agreement obligates BKC to contact the insurance carrier on its own when a lawsuit such as plaintiff's is filed. We will not allow King Dining to essentially rewrite the franchise agreement by labeling its argument as a "mitigation of damages" argument. At any rate, BKC had no duty to mitigate hypothetical damages during the period in question; BKC simply attempted to enforce the terms of the franchise agreement, and when action from King Dining was not forthcoming, it took steps to protect its own interests. BKC acted properly, and we find no basis on which to reverse the trial court's grant of summary disposition.

King Dining argues that the trial court erred in awarding $20,292.03 in attorney fees and related costs. We review the reasonableness of an attorney-fee award for an abuse of discretion. *University Rehabilitation Alliance, Inc v Farm Bureau Gen Ins Co of Michigan*, 279 Mich App 691, 698; 760 NW2d 574 (2008).

> There is no precise formula for computing the reasonableness of an attorney's fee. However, . . . the facts to be taken into consideration in determining the reasonableness of a fee include, but are not limited to, the following: (1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client. [*Id*. At 698-699 (internal citation and quotation marks omitted).]

Much of King Dining's argument on appeal is simply a reiteration of the argument relating to mitigation of damages and will not be revisited here. Indeed, the thrust of King Dining's argument is that the attorney fees resulted from BKC's failure to mitigate damages. To the extent that King Dining's argument can be read as a proper and separate challenge to the

reasonableness of the fees, we reject such a challenge. BKC provided a detailed and credible invoice indicating all the actions it took in defending itself, and the attorneys involved charged a reasonable rate of $150 an hour. The trial court declined to award the full amount billed, indicating that "the reduced fee amount takes into consideration King Dining's good faith attempt to challenge the reasonableness of the attorney fees and costs." We find no basis on which to find an abuse of discretion.

Moreover, we agree with BKC that this case must be remanded for a determination of an award of appellate attorney fees. Indeed, the franchise agreement specifically provides for such an award.

Affirmed, and remanded for further proceedings in accordance with this opinion. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Michael J. Talbot
/s/ Patrick M. Meter